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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 ADRIENNE HOWARD,

9 Plaintiff,

v.

10 NAVIENT SOLUTIONS, LLC,  
11 EXPERIAN INFORMATION  
12 SOLUTIONS, INC., and EQUIFAX  
13 INFORMATION SERVICES, LLC,

Defendants.

CASE NO. C18-5333 BHS

ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANT NAVIENT  
SOLUTIONS, LLC'S MOTION TO  
COMPEL ARBITRATION

14 This matter comes before the Court on Defendant Navient Solutions, LLC's  
15 ("Navient") motion to compel arbitration. The Court has considered the pleadings filed in  
16 support of and in opposition to the motion and the remainder of the file and hereby grants  
17 in part and denies in part the motion for the reasons stated herein.

18 **I. PROCEDURAL HISTORY**

19 On April 27, 2018, Plaintiff Adrienne Howard ("Howard") filed a complaint  
20 against Navient, Experian Information Services ("Experian"), and Equifax Information  
21 Services ("Equifax") (collectively "Defendants") asserting causes of action against each  
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1 defendant under the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* (“FRCA”). Dkt.  
2 6. On August 9, 2018, Navient moved to compel all parties to arbitration. Dkt. 25.  
3 Navient also requests an order dismissing or staying this proceeding pending the outcome  
4 of the arbitration. *Id.* On August 27, 2018, Howard responded, and Experian and Equifax  
5 jointly responded. Dkts. 28, 29. On August 31, 2018, Navient replied. Dkt. 30.

## 6 II. FACTUAL BACKGROUND

7 Navient is a student-loan servicer formerly known as Sallie Mae, Inc. Dkt. 25 at 2.  
8 Howard is a borrower of student loans. Dkt. 26. Equifax and Experian are consumer  
9 credit reporting agencies as defined under the FCRA. *Id.* Navient and Howard have a  
10 relationship with respect to three private student loans Howard entered into in May 2007,  
11 February 2008, and September 2008. *Id.* Each loan is associated with a promissory note  
12 (“Note”), and each Note contains an arbitration agreement clause. *Id.* While the  
13 arbitration agreements have substantially similar provisions, the arbitration agreement in  
14 the September 2008 Note (“the Agreement”) controls as last-in-time. Dkt. 26-1 at 41.<sup>1</sup>  
15 The Agreement provides that:

16 **“Claim”** means any claim, dispute or controversy between you  
17 and me that **arises from or relates in any way to the Note**,  
18 including any dispute arising before the date of this Arbitration  
19 Agreement and any dispute relating to: (1) the imposition or  
20 collection of principal, interest, attorneys’ fees, collection costs  
or other fees or charges relating to this Note; (2) other  
provisions of this Note; (3) any application, disclosure and  
other document relating in any way to this Note or the  
transactions evidenced by the Note; (4) any insurance or other

21 <sup>1</sup> Unless otherwise indicated, all citations to pagination correspond to the pagination  
22 indicated by the individual document heading in the Court’s electronic court file, accessible  
through the CM/ECF system.

1 service or product offered or made available by or through you  
2 in connection with the Note, and any associated fees  
3 or charges; and (5) your methods of soliciting my business; and  
4 (6) any documents, instruments, advertising or promotional  
5 materials that contain information about this Note or any  
6 associated insurance or other service or product. This includes,  
7 without limitation, disputes concerning the validity,  
8 enforceability, arbitrability or scope of this Arbitration  
9 Agreement or the Note; disputes involving alleged fraud or  
10 misrepresentation, breach of contract or fiduciary duty,  
11 **negligence or other torts, or violation of statute, regulation  
12 or common law.** It includes disputes involving requests for  
13 injunctions or other equitable relief. However, “Claim” does  
14 not include any individual action brought by me in small  
15 claims court or my state’s equivalent court, unless such action  
16 is transferred, removed, or appealed to a different court.

17 *Id.* § 4. It is undisputed that Howard signed the Note; it is also undisputed that Howard  
18 failed to opt out of the Note’s arbitration clause. Dkt. 26.

19 In 2010, Howard and her then-husband filed for bankruptcy, Dkt. 6, ¶ 7, and  
20 brought an adversary action against Sallie Mae contesting the non-dischargeability of  
21 Howard’s student loans. *Id.* Howard and Sallie Mae eventually agreed to a stipulated  
22 settlement that consolidated Howard’s loans under the three Notes and reduced their  
principle balance. *Id.* ¶ 8. The bankruptcy court approved the settlement, and the case was  
dismissed. *Id.* Howard contends that, from 2011 on, first Sallie Mae and then Navient  
failed to report Howard’s updated and reduced loan balance to the credit reporting  
agencies. *Id.* Because Sallie Mae and Navient failed to report Howard’s lowered balance,  
they also reported her loans as delinquent when she made payments in amounts that had  
been approved under the settlement agreement, but were lower than payment amounts  
she owed prior to the settlement. *Id.* ¶¶ 8–11. Howard has disputed Navient’s reporting

1 related to her loans for years. *Id.* ¶ 11. Howard further alleges that Navient’s inaccurate  
2 reporting of the consolidated loan balance caused Experian and Equifax to report various  
3 delinquencies on Howard’s credit report, and Howard’s disputes over those reports are  
4 the subject of her FCRA claims against Experian and Equifax. Dkt. 6.

5 While Experian and Equifax do not take a formal position on Navient’s motion to  
6 compel Howard to arbitration, they oppose their inclusion. Dkt. 29. Experian and Equifax  
7 were not parties to the underlying loan transactions between Howard and Sallie Mae  
8 which gave rise to the Note, nor did they agree to be bound by the Agreement’s terms. *Id.*

### 9 III. DISCUSSION

#### 10 A. Standard

11 The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (“FAA”) makes agreements to  
12 arbitrate “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in  
13 equity for the revocation of any contract.” 9 U.S.C. § 2. The FAA supports a liberal  
14 policy favoring arbitration, and reinforces the “fundamental principle that arbitration is a  
15 matter of contract.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011). The  
16 FAA requires courts to “rigorously enforce” agreements to arbitrate, *Mitsubishi Motors*  
17 *Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985), to ensure that private  
18 contractual provisions “are enforced according to their terms.” *Stolt–Nielsen S.A. v.*  
19 *AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684 (2010) (quoting *Volt Info. Sciences, Inc. v.*  
20 *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

21 The party seeking to compel arbitration has the burden of proving that an  
22 arbitration agreement exists and that it applies to the dispute at issue. *Ashbey v. Archstone*

1 *Prop. Mgmt., Inc.*, 785 F.3d 1320, 1323 (9th Cir. 2015) (citing *Cox v. Ocean View Hotel*  
2 *Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008)). As discussed below, the Court concludes  
3 that Navient met its burden in relation to Howard, but not as to Experian or Equifax.

4 **1. Howard**

5 Howard argues that she brings no arbitrable claim under the Agreement, asserting  
6 that her cause of action does not arise from Navient's failure to comply with its duties  
7 under the Note, but instead stem from Navient's failure to report accurate information  
8 after the settlement submitted in the bankruptcy proceedings, despite Howard's  
9 performance. Dkt. 28 at 3:18–24. Alternatively, Howard argues the Agreement is  
10 unconscionable under Washington law. Because the Court concludes that Howard's  
11 claims arise from Navient's performance of its duties under her Notes, and that the  
12 Agreement is not substantively unconscionable, the Court compels Howard to arbitrate  
13 her claims against Navient.

14 **a. Because Howard's claims relate to her promissory Notes, the**  
15 **arbitration Agreement controls**

16 Under the FAA, this Court must enforce valid arbitration agreements that apply to  
17 disputes at issue before it. *Ashbey*, 785 F.3d at 1321. The parties disagree over the  
18 Agreement's application to Howard's FCRA claims. Howard attempts to avoid  
19 arbitration by limiting the scope of her claims to Navient's misreporting of her  
20 obligations after the bankruptcy settlement, which allowed Howard to pay a reduced  
21 balance. Dkt. 6, ¶¶ 8–11.  
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1       The Agreement is phrased to cover any claim that “**arises from or relates in any**  
2 **way to the Note.**” As stated by Howard, her claims allege that Navient violated its  
3 reporting and investigative duties under the FCRA in failing to accurately report the  
4 amounts Howard owed after the settlement. Yet the settlement stipulation itself was  
5 directly related to the Notes, because the settlement consolidated them into a reduced  
6 balance without formally amending or superseding the Notes themselves.<sup>2</sup> Therefore,  
7 even though Howard only challenges Navient’s reporting actions on the Notes after the  
8 date of settlement, it remains that she impliedly challenges the amounts she owes under  
9 the Notes themselves. Indeed, any challenge Howard makes against Navient’s reporting  
10 or investigatory actions on the loans are inherently related to the underlying promissory  
11 Notes. Because the settlement relates to the Notes, so too do Howard’s claims here.

12       Moreover, “although gateway issues of arbitrability presumptively are reserved for  
13 the court, the parties may agree to delegate them to the arbitrator.” *See, e.g., Howsam v.*  
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15       <sup>2</sup> The stipulated settlement also included a provision that states: “[e]xcept as provided in  
16 this Stipulation, all other terms of the Promissory Notes remain in effect and are hereby  
17 incorporated by reference.” *See* Stipulation in Settlement of Adversary Proceeding at 4, Howard  
18 v. Sallie Mae, Inc. (*In re* Howard), Adv. Proc. No. 10-04314 (Bankr. W.D. Wash. Oct. 4, 2011).  
19 Neither party filed the stipulated settlement, but the Court takes judicial notice of its contents *sua*  
20 *sponte*. *See Shetty v. Wells Fargo Bank, NA*, 696 F. App’x 828, 829 (9th Cir. 2017) (district court  
21 did not abuse discretion by taking judicial notice of federal and state court proceedings), *cert.*  
22 *denied sub nom. Shetty v. Wells Fargo Bank, N.A.*, 138 S. Ct. 705 (2018); *United States v.*  
*Woods*, 335 F.3d 993, 1000-01 (9th Cir. 2003) (setting forth standard of review); *U.S. ex rel.*  
*Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992)  
(explaining that a court “may take notice of proceedings in other courts, both within and without  
the federal judicial system, if those proceedings have a direct relation to matters at issue”  
(citation omitted)); Fed. R. Evid. 201(b)(2).

1 *Dean Witter Reynolds, Inc.*, 537 U.S. 83, 83–85 (2002); *Green Tree Fin. Corp. v. Bazzle*,  
2 539 U.S. 444, 452 (2003). As demonstrated by the Agreement, the parties here intended  
3 to have the threshold question of arbitrability determined by an arbitrator. *See* Dkt. 26-1  
4 at 41 (“this includes, without limitation, disputes concerning the validity, enforceability,  
5 arbitrability or scope of this Arbitration agreement or this Note.”). This provides an  
6 alternate basis for the Court to compel arbitration. *See Momot v. Mastro*, 652 F.3d 982,  
7 985 (9th Cir. 2011) (finding that the district court erred in failing to enter a stay when  
8 unambiguous terms demonstrated the parties’ intent to bring threshold challenges to  
9 arbitration in an arbitral forum). Thus, Navient has met its burden to establish that the  
10 Agreement applies to Howard’s dispute.

11 **b. The Agreement is not unconscionable**

12 Howard argues that the Agreement is substantively unconscionable because it  
13 contains a unilateral right of appeal and a class waiver provision. Dkt. 28, 4–5. When  
14 determining whether a valid agreement to arbitrate exists, the courts apply the applicable  
15 state law of contract formation. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S.  
16 938, 944 (1995). Here, the lender Howard used was located in Utah, and the Note states  
17 that Utah law applies. Dkt. 26-1 at 39.<sup>3</sup> In Utah, substantive unconscionability is  
18 indicated by contract terms so one-sided as to oppress or unfairly surprise an innocent  
19 party. *Resource Management Co. v. Weston Ranch and Livestock Co., Inc.*, 706 P.2d  
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21 <sup>3</sup> In their opening briefs, Navient and Howard mistakenly assume that Washington law  
22 applies to the question of contract formation. *See* Dkts. 25, 28. Experian and Equifax correctly  
note that Utah law controls, Dkt. 29, and Navient impliedly concedes this in reply. Dkt. 30.

1 1028, 1041 (Utah 1985). Howard is mistaken in that no unilateral right of appeal is  
2 created by the mutual language of the Agreement, and class waiver provisions have been  
3 upheld within Utah and the Ninth Circuit. *See Johnmohammadi v. Bloomingdale's Inc.*,  
4 755 F.3d 1072 (9th Cir. 2014) (enforcing class waiver in arbitration agreement when  
5 plaintiff had option to opt out of agreement); Utah Code Ann. § 70C-4-105 (West 2006)  
6 (codification of the validity of class action waivers in open-end consumer credit  
7 contracts). Further, neither the class waiver provision nor the language presumably  
8 creating a unilateral appellate right are oppressive. The Court concludes that Howard has  
9 failed to show that the Agreement is unconscionable, and grants Navient's motion to  
10 compel Howard to arbitration.

## 11 **2. Equifax and Experian**

12 Neither Experian nor Equifax are signatories to the underlying Note or Agreement,  
13 yet Navient seeks to use estoppel to compel them to arbitration. Dkt. 25, 13–15. Such a  
14 holding would require the Court to extend *Ellsworth v. American Arbitration Ass'n*, 148  
15 P.3d 983, 989 (Utah 2006), which Navient acknowledges. The estoppel exception seeks  
16 to prevent a non-signatory from avoiding arbitration when the non-signatory seeks to  
17 benefit from some portions of a contract but to avoid its arbitration provisions. *Ellsworth*,  
18 148 P.3d at 989. As Navient's argument goes, the Court should bind the credit-reporting  
19 agencies to arbitration because Experian and Equifax derive a benefit from the Note, and  
20 because the facts of Howard's claims are intertwined. However, as the *Ellsworth* court  
21 points out, in cases implementing non-signatory estoppel, the non-signatory party sued a  
22 signatory on the contract, yet sought to avoid the contract's arbitration provisions. *Id.*

1 That is inapposite here, where signatory Howard sued non-signatories Experian and  
2 Equifax. Accordingly, the Court declines to extend the non-signatory estoppel exception  
3 and concludes that while Howard is bound by the arbitration agreement contained in the  
4 Note, as non-parties, Experian and Equifax are not.

### 5 **3. Appropriate Relief**

6 Once the court determines that the issues before it are suited to arbitration, § 3 of the  
7 FAA requires the court to stay litigation upon application of a party, until the arbitration  
8 has concluded. 9 U.S.C. § 3. Navient has requested such a stay, and so have Experian and  
9 Equifax. Dkts. 25 at 1–3; 29 at 5:5–6. Thus, a stay is warranted.

### 10 **IV. ORDER**

11 Therefore, it is hereby **ORDERED** that Navient’s motion to compel arbitration is  
12 **GRANTED** in part and **DENIED** in part. Howard’s claims against Navient are  
13 compelled to arbitration, and Howard’s claims against Experian and Equifax are stayed  
14 pending its completion. The parties shall inform the Court when arbitration is completed,  
15 and the Clerk shall administratively close the case for statistical purposes.

16 Dated this 18th day of October, 2018.

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19 BENJAMIN H. SETTLE  
20 United States District Judge  
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